IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

O R D E R

Shyam Sunder Paneri & Anr. Vs. Jasmeet Singh & Anr.

S.B.CIVIL WRIT PETITION NO.1660/2006

Date of Order : 04.04.2006

PRESENT

HON'BLE MR.JUSTICE DINESH MAHESHWARI

Mr. Rajesh Joshi, for the petitioners.
Mr. Shambhu Singh, for the respondent No.1.

BY THE COURT:

This writ petition has been submitted by the defendant-petitioners against the order dated 25.02.2006 (Annex.7) passed by the Addl. District Judge (Fast Track) No.2, Udaipur refusing their application under Order 37 Rule 4 of the Code of Civil Procedure (CPC).

Briefly put, the facts relevant for determination of the questions involved in this writ petition are that the respondent No.1 has filed a suit against the defendant-petitioners under Order 37 CPC for recovery of an amount of Rs.1,10,000/- and interest on the principal amount due. According to the plaint averments, there was a business relationship between the parties where the plaintiff allegedly leased out a road-roller to the defendant No.1 and the rent of the said road-roller from the month of September 2003 to May 2004 was due in the defendant No.1 to the tune of Rs.1,10,000/-; and in discharge of that liability, the defendant No.1 had written cheque No.413546 dated 31.12.2004 on Allahabad Bank, Sector No.13 in his account No.1282 and it was also agreed by the defendant No.2 that if the amount would not be received by the plaintiff, the house belonging to the defendant No.2 could be put to sale by the plaintiff for recovery of his due amount.

Summonses were issued on 17.08.2005 as contemplated by Rule 2 of Order 37 in the name of petitioners, at the address of their place of residence, calling upon them to enter appearance within ten days of service of summons; and as per the report of the process server, summonses meant for both the defendants, the present petitioners, were offered to the defendant No.2 who was found at the given address and on her refusal to

accept, the same were affixed at the house in the presence of two witnesses, Harpreet Singh and Bhanwar Lal on 24.08.2005.

From the order-sheets (Annex.4) in the said Civil Suit No.105/2005, it appears that the suit was transferred on 25.08.2005 to the Court of Addl. District Judge (Fast Track) No.2, Udaipur and was taken up for consideration on the date already fixed i.e. 03.10.2005. The learned trial Judge found that summonses have already been served on 24.08.2005 and the defendants have failed to put in appearance within ten days and were not entitled to defend the suit and, therefore, the suit was required to be decreed. Accordingly, decree was passed for a sum of Rs.1,10,000/- as principal and Rs.52,800/- as interest till the month of July 2005. The plaintiff was also held entitled for future interest @ 6% per annum.

An application was submitted by the defendant-petitioners on 13.02.2006 stating that they had never been served with the summons in the suit and came to know about the decree so passed against them only on 08.02.2006 when the Sale Ameen visited their house. It was also stated that defendant No.1 was out of Udaipur for the last two years in connection with the treatment of his daughter suffering from cancer and the defendant No.2 was residing at her parental house on 24.08.2005; and at the address given in the summons, the defendant No.2 was not present, nor any process

server visited nor any summons was offered nor refused and that the plaintiff has wrongly got the endorsement of refusal and affixture made by stating two persons as witnesses, both of whom were the acquaintance of the plaintiff and were not likely to be available at the site. Raising various objections about validity of process of affixture and about maintainability of suit under Order 37 CPC and about rate of interest sought to be claimed, the application was submitted with the prayers that the ex parte decree dated 03.10.2005 may be set aside. It appears that no reply to the application aforesaid was submitted by the plaintiff.

The learned trial Judge, while dealing with the application in the impugned order dated 25.02.2006, noted the contentions of the defendants-petitioners about deficiency in service, about the defendants having no knowledge of the suit and the defendant No.1 having gone out and the defendant No.2 residing at other place and the suit being not maintainable under Order 37 CPC. After noticing the contentions, learned trial Judge was of opinion that the defendant is required to satisfy the Court about special circumstances for setting aside the decree but no such special circumstances were shown. In relation to the averments taken by the petitioner No.1 about his having gone out in connection with the treatment of his daughter, it was observed that the averments were vague and incomplete and even the particulars of the city visited

were not stated. The learned Judge also opined that the defendant No.2 could have engaged a lawyer and extended proper instructions as merely the address for service was required to be filed within ten days and it has not been shown that the defendant No.2 could not have even engaged a lawyer for filing of the address [as required by sub-rule (1) of Rule 3 of Order 37 CPC].

Assailing the order aforesaid, learned counsel Mr.Rajesh Joshi appearing for the petitioners has contended that the application submitted by the petitioners was not even replied by the plaintiff-respondent No.1 and the facts stated therein remained undenied; that the learned Court below has not properly exercised its jurisdiction under Rule 4 of Order 37 CPC and has failed to consider that the petitioners have specifically pointed out the summons having not been served on them at all and such non-service specifically amounts to special circumstance contemplated by Rule 4 of Order 37; and that in the interest of justice, an opportunity to defend ought to have been extended to the petitioners. Per contra, learned counsel Mr.Shambhu Singh appearing in caveat for respondent No.1 has duly supported the order impugned with the submissions that the learned Court below has not committed any illegality or irregularity so as to warrant any interference in writ jurisdiction of this Court. Learned counsel has further submitted that petitioners have not been fair in their conduct; have not kept their

promise; the cheque given by the defendant No.1 in discharge of the liability has bounced; and the plaintiff-respondent No.1 is deprived of the amount reasonably due to be recovered from the defendant No.1. Learned counsel has also pointed out that the defendant has not only extended the cheque but has specifically stated an undertaking/agreement that if the amount as stated in the cheque be not received by the plaintiff, he would be entitled to recover the amount from the house in question, the place of residence of the very same address, at which summonses were served by affixture.

Having heard learned counsel for the parties and having perused the material placed on record, this Court is clearly of opinion that the impugned order as passed by the learned Addl. District Judge (Fast Track) No.2, Udaipur in disposal of the application under Order 37 Rule 4 CPC cannot be sustained.

It is true that under Rule 4 of Order 37 CPC, the defendant is required to show 'special circumstances' as distinguished from 'sufficient cause' contemplated by Rule 13 of Order 9 CPC for setting aside the decree passed on his failure to appear and obviously, the gravity of reasons under the former is higher; but this requirement cannot be put to such unrealistic extreme that it becomes practically impossible for a defendant to seek a hearing in the matter. Special circumstances, in the context

of Rule 4 of Order 37 CPC deserve to be looked at from a practical stand point; having regard to the object and purpose of such rules of procedure; and existence of special circumstances in a given case would depend upon its overall facts and circumstances. Learned trial Judge in the present case appears not to have considered the matter comprehensively and the impugned order, if allowed to stand, is likely to result in manifest failure of justice.

A look at the considerations adopted by the learned Judge, makes it apparent that despite noticing specific submissions of the petitioners-defendants that summonses were not properly served and despite noticing the averments of the defendant No.1 of his having been out for last two years in connection with the treatment of his daughter suffering from cancer and the defendant No.2 not residing at the given address but residing at the parental house, such submissions have not been properly considered and appreciated by the learned Judge. Another submission made by the petitioners questioning maintainability of the suit under Order 37 CPC has also been brushed aside with the simple observation that it does not amount to a special circumstance to set aside the decree.

The learned trial Judge has failed to consider the significant fact that the averments as taken by the petitioners in their application were not put to any rebuttal by filing any reply by the

plaintiff-respondent No.1 and prima-facie there was no reason to totally disbelieve the submissions made by the petitioners and to suggest as if the petitioner No.1 has made a wrong statement even about his daughter suffering from cancer. The observations made by the learned Judge about non-discloser of the place where he has taken his daughter for treatment, to say the least, do not represent consideration of the matter in right perspective and so also on relevant considerations. In the fact situation of the case, there does not appear to be any intention in the defendants not to put in appearance in response to the summons under Order 37 CPC. However, even if it be assumed that summonses were properly served, this Court is clearly of opinion that if the defendant had not put in appearance despite service of summons under Order 37 CPC and puts in appearance later on before the Court pointing out circumstances for his non-appearance at the previous occasion, the requirement of the rules of procedure would ordinarily be to afford an opportunity of defence to the defendant on reasonable terms rather than driving him out on technicalities.

Having regard to all the circumstances of the case, this Court is of opinion that interest of justice would definitely have been served if the defendants were extended an opportunity to defend themselves in the suit and of course, in the interest of justice, the

defendants could have been put to reasonable terms before granting such leave to defend.

Having regard to the subject matter of dispute and uncertain nature of defence, it appears appropriate that the defendants-petitioners ought to be put to the conditions of depositing an amount of Rs.50,000/- before the trial Court and on their doing so, the said amount may be permitted to be withdrawn by the plaintiff-respondent No.1 on his furnishing a solvent security for restitution, in case so required. The petitioners ought to be further put to condition of submitting a solvent security in an amount of Rs.60,000/- before the trial Court; and on the petitioners' complying with the requirements of this order, they deserve to be extended the leave to defend.

As a result of the aforesaid, this writ petition succeeds and is allowed to the extent indicated above. The impugned order dated 25.02.2006 is set aside; the application submitted by the petitioners under Order 37 Rule 4 CPC is allowed with the conditions that: The petitioners shall deposit an amount of Rs.50,000/- and so also furnish a solvent security in the sum of Rs.60,000/- to the satisfaction of the trial Court on or before

17.04.2006; the amount of Rs.50,000/- deposited by the petitioners shall be permitted to be withdrawn by the plaintiff-respondent No.1 on his furnishing a solvent security to the satisfaction of the trial Court. On complying with the requirements of this order, ex parte decree dated 03.10.2005 would stand set aside; and obviously, as a consequence of setting aside of decree, the execution proceedings shall stand quashed; and the petitioners shall be granted leave to defend and shall be permitted to put in their written statement within 30 days thereafter and learned trial Court shall proceed with the matter in accordance with law. Parties shall appear before the trial court on 17.04.2006. In the circumstances of the case, the parties shall bear their own costs of this writ petition.

(**DINESH MAHESHWARI),J.**

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